

**D.B. CIVIL SPECIAL APPEAL (W) NO.114/2005
(UOI & Ors. Vs. Smt. Onkar Kanwar)**

Date of order : 4.12.2006

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. Ravi Bhansali, for the appellants.
Mr. Pushpendra Singh Bhati, for the respondent.

Heard learned counsel for the parties.

This appeal is directed against the judgment of the learned single Judge dated 21.2.2004.

The respondent is heir of Ex-Head Constable Kishore Singh, who was found time and again in an intoxicated condition. He was the member of service of Boarder Security Force.

The facts which are not in dispute are that he was found in an intoxicated condition on 11.1.1995 while he was posted at Kolkata, for which he was awarded 28 days RI. He was again found in an intoxicated condition on 11.4.1995 while he was posted at Khajibagan, for which he was awarded seven days RI. Since the first punishment was imposed, he did not quit the habit of consuming heavy liquor.

On 14th December, 2001, he was promoted from

the post of Constable to Head Constable. After six months of his promotion he was again found in an intoxicated condition on 31.5.2002 and he was awarded punishment of severe reprimand while posted at Raninagar. Thereafter, continuously for three days on 14.6.2002, 16.6.2002 and 17.6.2002, he was again found in intoxicated condition so much so he was found lying in drunken state on a roadside, a civilian informed that one of BSF officer is lying on the road in drunken condition. This led to service of charge-sheet on the incumbent and proceedings were taken before the Summary Security Force Court. The witnesses produced before the Summary Security Force Court were not cross-examined. On the other hand, the incumbent accepted the fact that he was found in intoxicated condition. He admitted that he is a compulsive liquor consumer and he prayed that since he was not found in intoxicated condition while on duty, therefore, his case may be treated leniently. He also prayed that his habit of indulging in intoxication be treated as disease rather than habit and he may be subjected to medical treatment.

However, looking to the series of incidents where the incumbent was found in intoxicated condition, even the award of punishments in the past never to yield results. After promotion, he was again found in intoxicated condition and he did not stop his habit of indulging in excessive drinking even after severe

reprimand. The Summary Security Force Court awarded punishment of dismissal from service instead of awarding RI which could extend to six months. Appeal against the aforesaid order of dismissal was rejected by the Appellate Authority. The order of dismissal was passed on 12.7.2002. The appeal was rejected on 18.10.2002.

After the appeal was dismissed, the incumbent died on 31.10.2002 due to heart-attack. Thereafter, this petition has been filed by the widow of deceased for setting aside the order of punishment of dismissal and providing of family pension, gratuity, leave encashment etc. to the petitioner. The petitioner also sought a mandamus for compassionate appointment to one of her family member as a consequence of setting aside of the punishment order.

The main contention raised by learned counsel for the respondent-petitioner is that the incumbent was not found in intoxicated state while on duty, that he was not found to be misbehaving while he was drunk and that he had a long tenure of satisfactory service which ought to have been considered before imposing the extreme punishment of dismissal, which had left his family unprovided for, after fifteen years and three months of service in Force.

The learned Single Judge considered that

there was no mention in the charge-sheet that at the duties hours, the husband of the petitioner was found in intoxicated condition, there was no medical evidence that he was found intoxicated during duty hours, therefore, the respondent's stand of consuming liquor by the incumbent during the duty hours is not sustainable on the available material and for these reasons, the impugned orders of the Summary Security Force Court as well as the Appellate Authority are not sustainable. As a result, the impugned orders were quashed and the appellants were directed to release all the retiral benefits to the petitioner including family pension.

Having heard learned counsel for the parties and perusing the record, we find that reference to employer's stand that petitioner's husband was found in intoxicated state during the duty hours was a wholly unfounded and irrelevant consideration for the purpose of examining whether the petitioner's husband can be found guilty of the misconduct of having found in intoxicated state. Perhaps, the learned Single Judge assumed from the phrases used by the respondents in their reply that the petitioner's husband was habitual offender of consuming liquor on duty.

We find that Section 26 of Chapter-III of the Boarder Security Force Act, 1968 (hereinafter referred to as the "Act of 1968" only) defines offence for

intoxication and punishments to be awarded. It is not the essential ingredients of a charge of misconduct of intoxication that a person should be found in intoxicated state on duty only in order to invite punishment prescribed under Section 26 of the Act of 1968. Section 26 of the Act of 1968 in no uncertain terms provides as under :

“any person subject to this Act who is found in a state of intoxication, whether on duty or not, shall, on conviction by a Security Force Court, be liable to suffer imprisonment for a term which may extend to six months or such less punishment as is in this Act mentioned”.

Therefore, finding an incumbent in an intoxicated condition on duty is not the relevant consideration so far as establishing that an offence under Section 26 is committed. As a matter of fact, the petitioner's husband was found in intoxicated condition on many a occasions and he was a compulsive drunkard is an admitted position even in the statement before the Summary Security Force Court by the petitioner's husband as well as in the writ petition by the petitioner. Suffice it to state that the petitioner has mentioned in the writ petition that “it would be relevant to mention here that the job of the petitioner's husband was in extreme climatic conditions, solitude and the risk factor was also very high due to deployment in sensitive areas. Unfortunately due to such circumstances, the

petitioner's husband picked up the wrong habit of consuming the Alcohol and could not leave it even after persuasion and repeated requests". The deceased incumbent while not cross examining the witnesses produced by the prosecution, he has stated that :

"On June, 16, I got some liquor from one civilian. In evening I drink liquor. After this I went for ambush duty. Next day on completion on ambush duty I come back in post and drink the left liquor. Due to some domestic problems I was in tension so I used the liquor. After some times, post Comdr. HC Budh Ram told me that Coy Comdr. Sh. J.S. Rathore called you in Coy HQ Dabrahat. On this I reached at Copy HQ and met to Coy Comdr. Coy Comdr ordered me to got for Chandni Post, after this I called a van and marched for Chandni post. In between route, some uneasiness and fell down unconscious situation and after this what happened I do not know, next day when I got since I found myself in hospital."

This statement goes to show that the petitioner's husband in fact was found in an intoxicated state while he was going to the Chandani Post to discharge his duty and he passed out while going on duty. It is also corroborated by the statement of Budh Ram whose statements have also been placed on record who was to state that :

"On 16th June, 2002, HC Kishore Singh lying in camp in day time. In evening I said duty of Ambush to him. After that I went for Ambush duty. After Ambush duty I back in post in next day morning I saw that he was still in same condition. In this regard, I report to Coy Comdr and wrote an application in the name of Coy Comdr "F" Coy, Company Comdr said to me that sent him

to HQ. I sent him in HQ Dabrahat”.

Apparently from 16th evening until 17th morning, he was in an intoxicated state is also corroborated by the statement of Budh Ram.

Be that as it may, we find that in the charges, reference to the simple facts that on 14.6.2002 at 21.36 hours and that on 16.6.2002 at 17.00 hours and on 17.6.2002 at 06.00 hours, he was found in an intoxicated state by consuming country liquor. These facts are admitted. Thus, whether the petitioner's husband was found in an intoxicated state while on duty or not is not irrelevant. Charge was fully proved. We are, therefore, of the opinion that learned Single Judge was clearly in error in setting aside the orders of punishments by emphasizing on the fact referring to the reply that the petitioner's husband was habitual of intoxication during the duty period prior to his dismissal from service whereas in para 4 of the reply, the respondents have stated that the petitioner's husband was habitual offender of consuming liquor on active duty. The petitioner was habitual offender of consuming liquor is not the fact denied by the petitioner, on the contrary, it is accepted. In these circumstances, there was no error in the order of the Summary Security Force Court and the appellate authority in finding the husband of the petitioner guilty of offence under Section 26 of the

Act of 1968.

We are of the opinion that setting aside of the impugned orders finding petitioner's husband guilty of being in intoxicated condition on different dates was not liable to be interfered with by this Court in exercise of extra ordinary jurisdiction by way of judicial review.

On the question of quantum of punishment the primary punishment, which is required to be imposed under Section 26 of the Act of 1968 for the offence of intoxication is RI for a term which may exceed to six months or any lesser punishment, which has been mentioned in the Act.

The scope of punishment which could be inflicted from higher to lesser in order of serietum has been prescribed under Section 48 of the Act of 1968, which reads as under :-

“48. Punishments awardable by Security Force Courts. - (1) Punishments may be inflicted in respect of offences committed by persons subject to this Act and convicted by Security Force Courts according to the scale following, that is to say. -

- (a) death;
- (b) imprisonment which may be for the term of life or any other lesser term but excluding imprisonment for a term not exceeding three months in Force custody;
- (c) dismissal from the service;
- (d) imprisonment for a term not exceeding three months in Force custody;

(e) reduction to the ranks or to a lower rank or grade or place in the list of their rank in the case of an under-officer;
 (f) forfeiture of seniority of rank and forfeiture of all or any part of the service for the purpose of promotion;
 (g) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;
 (h) fine, in respect of civil offences;
 (i) severe reprimand or reprimand except in the case of persons below the rank of an under-officer;
 (j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active duty;
 (k) forfeiture in the case of person sentenced to dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such dismissal;
 (l) stoppage of pay and allowances until any proved loss or damage occasioned by the offence for which he is convicted is made good.

(2) Each of the punishments specified in sub-section (1) shall be deemed to be inferior in degree to every punishment preceding it in the above scale.

Apparently, the maximum punishment which could be inflicted under Section 48 for the offence committed by the husband of the petitioner falls under Clause (b) of Section 48 and the dismissal from the service falling under Clause (c) of Section 48 is a lesser punishment and could have been inflicted to the incumbent in terms of Section 26 of the Act of 1968 on being punished by Summary Security Force Court.

Learned counsel for the appellant contends that once the offence under Section 26 is proved to have been committed by the incumbent, the quantum of

punishment rests with the discretion of the Disciplinary Authority and is not liable to be interfered with by way of judicial review. The reliance is placed in case of Union of India & Ors. Vs. Narain Singh [AIR 2002 SC 2102] wherein the Supreme Court said that "Court must not lightly interfere with sentences passed after a properly conducted enquiry where the guilt is proved. Reduction of sentence, particularly in military, para-military or police services can have a demoralizing effect and would be a retrograde step so far as discipline of these services is concerned".

On the other hand learned counsel for the respondent-petitioner urged that amongst the various offences defined under Chapter - III of the Act of 1968, offence under Section 26 is the least grievous in nature. He also urged that the deceased incumbent had been promoted only in recent past that is only in December, 2001 indicating that his past service was good enough to earn him a promotion. Considering that he has not been found in an intoxicated condition since, he was last sentenced to seven days imprisonment in 1995 for almost seven years, the punishment of dismissal from service, depriving him from his livelihood was grossly disproportionate to the gravity of misconduct proved. Therefore, infliction of punishment of dismissal from service, depriving the petitioner from his livelihood, is highly arbitrary and

unjust and deserves to be interfered with.

Having considered the totality of the circumstances, we are of the opinion that the fact that the incumbent had died soon after his appeal was rejected should not blur the vision with misplaced sympathy which could weigh while considering the lesser punishment than provided under Section 26 of the Act of 1968. Undoubtedly, the considerations which are pointed out by the learned counsel for the respondent-petitioner are relevant while devising a just and appropriate punishment for the offence proved to have been committed by the incumbent. The other considerations which too deserve equal consideration are that the incumbent had been found in an intoxicated condition time and again as per the reply submitted by the respondents and noticed by us above. The fact that it is specifically not mentioned that the incumbent was found in an intoxicated condition while on duty cannot be under scored and that the petitioner's husband was a habitual drunkard to the extent that he was found in an intoxicated state while proceeding on duty. The material placed on record in the form of admission by the incumbent himself that in the intervening period of 16.6.2002 and 17.6.2002, he consumed liquor while on duty. The fact that the petitioner's husband was found in an intoxicated condition while on duty or after the duty is not relevant for the purpose of finding him guilty for offence under Section 26 of the Act of 1968

but that may only entail in determining the gravity of offence actually committed by him. There is admission of the deceased incumbent in the court's proceedings and also by the petitioner in the writ petition to which we have referred to hereinabove that the petitioner's husband was habitual and compulsive drunkard. In other words, he had no control over his drinking habit. In these circumstances, it cannot be said that after giving him multiple chances to improve upon his conduct, since he was found in an intoxicated condition time and again, no sign of improvement was shown, even after he was promoted but on promotion in quick succession, was found in highly intoxicated condition, goes to show that he was even oblivious to his position and status. Considering all these aspects, it cannot be said that the punishment imposed by the Security Force Court was grossly disproportionate to the gravity of offence committed by the petitioner's husband. In that view of the matter, no interference was called for with the punishment imposed by the Security Force Court in exercise of the powers vested under the Statute as it has acted within his jurisdiction and not acted unreasonably in punishing the petitioner's husband. It is rather unfortunate that soon after the appeal was rejected the petitioner's husband died but that do not take away the force of the order passed by the Security Force Court as well as by the appellate authority on considering the material on record.

we have also noticed that the learned Single Judge has seriously erred in finding that offence under Section 26 of the Act of 1968 was not proved against the petitioner's husband because there was no evidence that he was found in an intoxicated condition while he was on duty, which is contrary to the Scheme of Act of 1968. Accordingly, the same cannot be sustained. Consequently, the appeal is allowed. The judgment under appeal is set aside. The writ petition is dismissed. No order as to the costs.

(GOPAL KRISHAN VYAS), J.

(RAJESH BALIA), J.

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